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No. 92-1369

Supreme Court
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOSEPH ALBERICI and THERESA ALBERICI, h/w,
Petitioners

v.

UNITED STATES GOVERNMENT, et al.,
Respondents

JOSEPH ALBERICI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

CONSOLIDATED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF DELAWARE COUNTY AND GEORGE T. LEWIS

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QUESTIONS PRESENTED

I. Whether the Court below properly affirmed the dismissal of Petitioners' entire Complaint without granting leave to amend.

II. Whether the Court below properly affirmed the dismissal of Petitioners' RICO claims as barred by the applicable Statute of Limitations.

III. Whether the Court below properly affirmed the dismissal of Petitioners' Civil Rights claims as barred by the applicable Statute of Limitations.

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OPINIONS BELOW

The instant Petition for Writ of Certiorari has been taken from the Order of the United States Court of Appeals for the Third Circuit in Case No. 92-CD-1258

dated November 5, 1992, denying the Petition for Rehearing filed by Appellant, Joseph Alberici. The text of this Order is set forth as Appendix B to the Consolidated Petition for Writ of Certiorari.

The Appeal below was taken from the Order of the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 91-4870, dated March 13, 1992, and amended March 20, 1992, dismissing Plaintiffs' Complaint with prejudice, and dismissing all outstanding Motions. True and correct copies of the Order and Amended Order of the District Court are attached to the Consolidated Petition for Writ of Certiorari as Appendix A.

Any other Order concerned with the instant Petition is from an action to which Respondents were not a party.

COUNTERSTATEMENT OF THE CASE

The Complaint below was brought by Petitioners against forty-three Defendants, including individuals, insurance companies, municipalities and government prosecutors. Among the named Defendants were Respondents, Delaware County (a municipality) and George T. Lewis, an agent of said municipality. This Complaint contains broad, conclusory allegations that the various Respondents (Defendants below) conspired amongst themselves and with others to either fabricate evidence used at the criminal trial of Petitioner, Joseph Alberici, or otherwise attempt to harass and defraud the Petitioners. The various counts in the Complaint included alleged violations of: the Racketeering Influence and Corrupt Organization Act, 18 U.S.C. §1964 (hereinafter "RICO"); the Civil Rights Act, 42 U.S.C. §1983; Federal Anti-Trust Laws under 16 U.S.C. §1 *et seq.*; and the State Law Torts of Libel, Slander and Intentional Infliction of Emotional Distress. (*See* Appendix of Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania [hereinafter App. of Appeal] at 41-43).

Petitioner, Joseph Alberici, was indicted in 1982 on six counts of mail fraud, based upon evidence that he brought about the arson of the Jerry Lewis Theater in Aston, Pennsylvania in order to collect insurance proceeds. (App. of Appeal at 48-49). Prior to the fire at the Jerry Lewis Theater, Petitioner, Joseph Alberici, had entered into an agreement to purchase this property, and had obtained several fire insurance policies on it. (App. of Appeal at 16-17). He was found guilty of all six counts of mail fraud and was sentenced to a twenty month prison term on November 9, 1983. (App. of Appeal at 17). Petitioner was eventually granted a new trial on five of the six counts of mail fraud, but his conviction on count five of the indictment was sustained. (App. of Appeal at 30). On January 8, 1985, Petitioner, Joseph Alberici, filed a Motion for a New Trial alleging newly discovered evidence. Although he was granted ten hearings on this Motion, it was eventually denied on August 9, 1985. (App. of Appeal at 49). On June 27, 1987, the United States Court of Appeals for the Third Circuit upheld Alberici's conviction. *Id.* Nowhere in their Complaint do Petitioners show that any criminal proceedings were terminated in favor of Petitioner, Joseph Alberici, in a manner absolving him of guilt.

The Complaint in this matter also includes allegations surrounding a civil suit filed by Petitioners, Joseph and Theresa Alberici, against various insurance companies, who are also Respondents herein. (App. of Appeal at 17). Petitioners sought to recover insurance money for the damage to the Jerry Lewis Theater caused by the fire for which Joseph Alberici was eventually found responsible. Petitioners have not made any allegations that Respondents, Delaware County and George T. Lewis, were involved with those civil proceedings. Petitioners have now added some new allegations against these Respondents in their Petition for Writ of Certiorari to this Honorable Court. These factual allegations in the

Petition should not be considered, as they were not part of the record below.

Respondents, Delaware County and George T. Lewis, filed a Motion to Dismiss Petitioners' Complaint below pursuant to Federal Rule of Civil Procedure 12(b)(6) on or about October 18, 1991. This Motion was granted by the Order of the Honorable Franklin S. Van Antwerpen, entered March 13, 1992 and supplemented by Order entered March 20, 1992.

SUMMARY OF THE ARGUMENT

Petitioners have failed to set forth in their Petition sufficient reasons why this Honorable Court should review the Order of the Court of Appeals in this matter. The claims against Respondents, Delaware County and George T. Lewis, were dismissed following their Motion to Dismiss in this matter because the Court found that all of their claims were barred by the applicable Statutes of Limitations. In addition, the Court found that Petitioners could not possibly state any viable cause of action against Respondents. The Court below therefore declined to grant Petitioners leave to amend their Complaint.

The claims of Petitioners below were properly dismissed as barred by the applicable Statutes of Limitations. Petitioners' Complaint included claims under the Racketeering Influence and Corrupt Organizations Act, 18 U.S.C. §1964. Petitioners failed to allege any elements of a RICO cause of action occurring within the four year Statute of Limitations. In addition, Petitioners' allegations did not even amount to sufficient predicate offenses necessary for a RICO claim. Finally, a RICO cause of action cannot be maintained against Respondent, Delaware County, as it is a municipality.

The Complaint in question also contained claims under the Civil Rights Act, 42 U.S.C. §1983. Such claims are governed by the state Statute of Limitations for personal injury actions, which in Pennsylvania is two

years. Petitioners failed to allege any conduct by Respondents occurring within two years of the filing of their Complaint which could support an action for civil rights violations.

The remainder of the instant Petition deals with Petitioner, Joseph Alberici's criminal case, or with other allegations that have nothing to do with Respondents herein. For this reason, Respondents will not address them in their Brief.

REASONS FOR DENYING THE PETITION

Pursuant to the Rules of this Honorable Court, a review on Writ of Certiorari will not be granted as a matter of right, but rather only by exercise of judicial discretion when there are "special and important reasons" supporting such review. Sup. Ct. R. 10.1. The Rules of the Supreme Court set forth examples of cases where review on a Writ of Certiorari will be considered. Sup. Ct. R. 10.1(a)-(c). These examples are as follows:

(a) When the United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with the state Court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower Court, as to call for an exercise of this court's power of supervision.

(b) When a state Court of last resort has decided a federal question in a way that conflicts with a decision of another state Court of last resort or of a United States Court of Appeals.

(c) When a state Court or United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal

> question in a way that conflicts with applicable decisions of this Court.

Sup. Ct. R. 10.1.

In the instant case, Petitioners have set forth many allegations in their Petition, some of which relate to the case below, and some of which are new. To the extent that the claims in the Petition relate to the denial of Petitioners' request for a Writ of Coram Novis, Respondents will not comment, since they are not parties to that case. To the extent that the Petition in question refers to the Order affirming the dismissal of Petitioners' Civil Action against Respondents, Petitioners have failed to set forth any sufficiently special or important reasons why this Court should then grant review on Writ of Certiorari. Nowhere have Petitioners alleged that the ruling of the Court of Appeals was in conflict with a decision of any other United States Court of Appeals on the same matter, or with a state Court of last resort. Petitioners also do not indicate anywhere that the Court of Appeals departed from the accepted course of judicial proceedings in issuing its Order affirming the dismissal of their Complaint. Finally, Petitioners point to no important question of federal law which needs to be resolved by this Honorable Court.

It is obvious from the instant Petition that Petitioners are dissatisfied with the ruling of the United States Court of Appeals for the Third Circuit in their civil action. They have attempted to add additional facts which were not part of the record below in an attempt to further prove the merits of their claims. The fact remains, however, that their Complaint was dismissed by the District Court for failure to state any cause of action upon which relief could be granted against any of the Defendants below. (App. of Appeal at 63). The addition of other facts at this stage is improper. Also, even these additional facts do not offer this Honorable Court a sufficient reason why it should review the decision of the Court of Appeals.

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' ENTIRE COMPLAINT WITHOUT GRANTING LEAVE TO AMEND.

The United States District Court for the Eastern District of Pennsylvania dismissed Petitioners' entire Complaint with prejudice, as it found that each of their claims was barred by the applicable Statute of Limitations. (App. of Appeal, at 56, 59, 61, 62). In addition to the fact that claims were time-barred, the District Court noted that Petitioners did not state a single claim for relief, and declined to give them leave to amend their Complaint because it did not find: ". . . any reason to believe that a well-founded action could be stated . . ." (App. of Appeal at 63). In addition, the Court found that there was "an element of harassment" present in the filing of this Complaint by Petitioners. *Id.*

Petitioners have argued that they should have been allowed to amend their Complaint following the District Court's dismissal of the action for failure to state a claim. (Petition, pp. 38-39). As noted above, the District Court did not actually base its dismissal on Petitioners' failure to state a claim, but rather on the various Statutes of Limitations. The Court did, however, clearly indicate that it would not grant Petitioners leave to amend, because it found no way in which they could possibly state a claim for relief. (App. of Appeal at 63).

In support of their claim that they should have been granted leave to amend, Petitioners have cited the case of *Sidbotham v. Robison,* 216 F.2d 816 (9th Cir. 1954). In this case, the Court of Appeals for the Ninth Circuit noted that a Court should allow amendment to a pleading if: ". . . it is shown that other facts exist, which if alleged, would cure the defect." *Id.* at 826 [citations omitted]. The instant case is distinguishable from *Sidbotham* because here it is clear that the District Court felt that no other facts could be shown or pled which would cure the defects in Petitioners' Complaint. This is

especially evident because the trial Court went so far as to use the phrase "element of harassment" in referring to Petitioners' Complaint. (App. of Appeal at 63). The Court also clearly stated why it believed that Petitioners could not possibly state a well-founded cause of action. (App. of Appeal at 56, 61-62). While these explanations may be brief, they adequately serve to inform Petitioners and this Honorable Court of the reasons for the Court's dismissal of this action with prejudice. With respect to Petitioners' RICO claims, the Court notes that:

> . . . the Complaint fails to allege a RICO enterprise or enterprises, fails to allege any predicate act sufficient to constitute a pattern of racketeering activity, fails to overcome the judicial and prosecutorial immunities of many of the defendants and the *res judicata* affect of the judgment against Joseph Alberici in both the District Court and the Pennsylvania Court of Common Pleas.

App. of Appeal at 56.

With respect to Petitioners' claims under the Civil Rights Act, 42 U.S.C. §1983, the District Court noted that:

> The Complaint does not sufficiently allege that the non-state actors acted under color of state law. It does not overcome the traditional privilege granted to pleadings in judicial proceedings, it relies on facts which have already been decided against Plaintiffs in other judicial decisions which must be given preclusive effect, nor does it overcome judicial and prosecutorial immunities of many of the defendants.

App. of Appeal at 61.

Finally, with respect to Petitioners' state law claims for Libel, Slander and Intentional Infliction of Emotional Distress, the District Court noted that any allegations in the Complaint occurring after July 31, 1989 consist of statements made in pleadings and judicial opinions which are recorded in absolute privilege under Pennsylvania law. (App. of Appeal at 62-63).

In their Motion to Dismiss the Complaint in this matter, Respondents, Delaware County and George T. Lewis, demonstrated how Petitioners failed to state a claim under the RICO statute, 18 U.S.C. §1964, because they did not allege any acts by either Delaware County or George T. Lewis which established a "pattern of racketeering activity." In fact, Petitioners did not attribute any *specific act* to Respondent, George T. Lewis. In addition, Petitioners failed to establish the existence of an "enterprise" being conducted or supported through racketeering activity. *See* 18 U.S.C. §1962. Also, with respect to Respondent, Delaware County, a RICO action cannot be maintained, as this Respondent is a municipality. *See Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3rd Cir. 1991). Petitioners failed to plead a sufficient cause of action against Respondents under 42 U.S.C. §1983 because they did not plead sufficient violations of their constitutional rights to support such an action, and also because they failed to meet the pleading requirement to establish liability against a municipality. Pleading requirements to establish liability for a violation of civil rights against a municipality were explained by the United States Court of Appeals for the Third Circuit in *Andrews v. City of Philadelphia,* 895 F.2d 1469 (3rd Cir. 1990). Finally, Petitioners failed to plead violations of state tort law against Respondents which overcame the immunity traditionally granted to municipal entities and their employees under the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S.A. §8541 *et seq.*

For the above-stated reasons, Respondents, Delaware County and George T. Lewis, submit that the United States Court of Appeals properly affirmed the Order of the District Court dismissing Petitioners' Complaint with prejudice.

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S CONCLUSION THAT PETITIONERS' RICO CLAIMS WERE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

As was noted by the Honorable Franklin S. Van Antwerpen of the United States District Court for the Eastern District of Pennsylvania, this Honorable Court in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156, 107 S.Ct. 2759 (1957), held that the four year Statute of Limitations applicable to suits under the Clayton Act should also be applied to RICO actions. (App. of Appeal at 53). Although this Honorable Court did not decide when the limitations period would begin, the Third Circuit established that the period would run from the time that "the Plaintiff knew or should have known that the elements of the civil RICO cause of action existed." *Keystone Insurance Company v. Houghton,* 863 F.2d 1125, 1126 (3rd Cir. 1988). The *Houghton* Court also added that if a further injury or further predicate act were to occur, the cause of action would accrue from the time when the Plaintiff knew or should have known of the "last injury or predicate act which is part of the same pattern of racketeering activity." *Id.* at 1130.

The District Court observes that Petitioners' Complaint really alleged two separate "plots" against them, one dealing with the criminal prosecution of Joseph Alberici and one dealing with the civil suit by Joseph and Theresa Alberici against the insurance companies. (App. of Appeal at 54-55). The only allegations in the Complaint against Respondents, Delaware County and George T. Lewis, which could even possibly fall within the definition of racketeering activity set forth in the RICO Statute are acts which occurred prior to the 1983 conviction and sentencing of Joseph Alberici. (App. of Appeal at 18-19, 21-22 and 41). Petitioners have made no allegations that Respondents, Delaware County or George T. Lewis, had any involvement with their civil

action in the Court of Common Pleas of Delaware County, or that they engaged in any conduct which would constitute the "racketeering activity" after 1983. Since Petitioners' Complaint was not filed until July of 1991, their RICO claims were clearly barred by the Statute of Limitations and were correctly dismissed by the District Court. Also, the District Court clearly did not even find these allegations sufficient to constitute predicate offense as necessary for a RICO claim. (App. of Appeal at 55).

In addition, even if Petitioners' claims under the RICO statute were not time-barred and did not constitute predicate offenses under RICO, they would not be able to maintain a cause of action for RICO violations against Respondent, Delaware County, as it is a municipality. *See Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3rd Cir. 1991). In the *Genty* case, the United States Court of Appeals for the Third Circuit became the first appellate court to hold that an action brought under 18 U.S.C. §1964(c) cannot be maintained against a municipality. *Id.* In so holding, the *Genty* Court noted that since the statute includes a mandatory recovery of treble damages, the primary purpose behind it was punitive. *Id.* at 914. The Court recognized that municipalities have traditionally been exempt from punitive damages, absent expressed statutory provisions to the contrary. 937 F.2d at 910. The rationale behind this exemption is that a municipality is incapable of committing a criminal act itself. *Id.* at 911. Another consideration is the fact that the only ones to really be "punished" would be the innocent taxpayers. *Id.*

For the above-stated reasons, Respondents submit that the Court of Appeals correctly affirmed the District Court's dismissal of Petitioners' RICO claims against Respondents, Delaware County and George T. Lewis, as being barred by the Statute of Limitations. Even if said claims were not barred, they could not be maintained against Respondent, Delaware County, as it is a municipality, and is therefore exempt from punitive awards.

Also, Petitioners failed to state a viable claim for RICO violations against either of these Respondents, so their Complaint was properly dismissed with prejudice.

III. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' CIVIL RIGHTS CLAIMS AS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

This Honorable Court has held that §1983 actions are governed by the state statutes of limitations for personal injury actions. *Wilson v. Garcia,* 471 U.S. 261, 278-280, 105 S.Ct. 1398, 1349 (1985). The Pennsylvania statute of limitations for personal injury actions is two years. 42 Pa. C.S.A. §5524(2). In its opinion, the District Court noted that unlike the accrual rule in a RICO action, for a civil rights action, the date when a cause of action accrues is "the date on which Plaintiffs knew or had reason to know of the injury that constitutes the basis of this action." (App. of Appeal at 57, *citing Deary v. Three Unnamed Police Officers,* 746 F.2d 185, 197 (3rd Cir. 1984)). The Court went on to state that it could tell from the face of the Complaint that Petitioners should have known of any injuries relating to the criminal persecution of Joseph Alberici by the date of his criminal conviction in 1983. (App. of Appeal at 57, *citing Syre v. Commonwealth of Pennsylvania,* 662 F. Supp. 550, 553-554 (E.D. Pa. 1987), *affirmed* 845 F.2d 1015 (3rd Cir.), *cert. denied* 488 U.S. 853, 109 S.Ct. 139 (1988)).

In their Brief to the Court of Appeals, and in the instant Petition, Petitioners have argued that their filing was timely as to civil rights violations, because of alleged fraudulent citations and warrants which they claim were issued between June 18, 1990 and December 5, 1990 by Respondents. (Appellants' Brief, p. 16 and Petition, p. 41). The actual paragraph in Petitioners' Complaint refers to citations and warrants, but does not mention

the dates of the citations and warrants, nor does it adequately explain how these alleged citations and warrants were related to the prior conviction of Joseph Alberici, or to the civil action filed against the insurance companies. (App. of Appeal at 41). Even if the Complaint had mentioned the dates of these alleged actions, this paragraph is insufficient to state a cause of action for a violation of 42 U.S.C. §1983, because it fails to meet the heightened pleading requirement established by the United States Court of Appeals for the Third Circuit for civil rights actions. *See Hall v. Pennsylvania State Police,* 570 F.2d 86 (3rd Cir. 1978); *Agresta v. City of Philadelphia,* 694 F.Supp. 117, 119-120 (E.D. Pa. 1988).

The District Court also noted that the Statute of Limitations for Petitioners' civil rights claim was not tolled under the Doctrine of Fraudulent Concealment because Petitioners never claimed in their Complaint that any conduct was concealed from them, or that they discovered it only recently. (App. of Appeal at 59). The Court further stated that Petitioners allege no due diligence in investigating the conduct and trying to discover the claims from the time the alleged actions occurred until the time they filed their Complaint. *Id.* In its Memorandum Opinion, the District Court made clear that there are certain elements which Petitioners must allege in their Complaint in order to benefit from the Doctrine of Fraudulent Concealment. (App. of Appeal at 58, *citing Bethlehem Steel Corp. v. Fischbach & Moore, Inc.,* 641 F.Supp. 271, 273 (E.D. Pa. 1986)). Petitioners clearly failed to meet the standards in their Complaint, and did not even attempt to set forth any facts in their Brief or in the instant Petition which would give this Honorable Court reason to reverse the decision of the Court of Appeals on the basis of fraudulent concealment. Therefore, the Order of the United States Court of Appeals affirming the trial Court's dismissal of Petitioners' claims on the basis of the Statute of Limitations must be affirmed.

IV. RESPONDENTS NEED NOT ADDRESS PETITIONERS' CLAIMS WHICH INCLUDE FACTS NOT OF RECORD BELOW, OR WHICH RELATE TO ACTIONS WHICH THEY ARE NOT A PARTY OR ACTIONS OCCURRING AFTER THE FILING OF THE INSTANT LAWSUIT.

As has been explained above, Petitioners' Complaint against Respondents, Delaware County and George T. Lewis, was dismissed because the facts as pled did not state a cause of action against these Respondents which fell within the applicable Statutes of Limitations, or which was sufficiently plead so as to indicate that Petitioners were entitled to any relief. Petitioners cannot now allege new facts which were not of record below. Also, Petitioners have added allegations as to incidents which occurred after the filing of their Appeal with the United States Court of Appeals for the Third Circuit. These claims mention individuals and/or entities which are not parties to the instant action. For this reason, these allegations should not be considered by this Honorable Court, and Respondents need not comment on them any further.

CONCLUSION

For the above-stated reasons, Respondents, Delaware County and George T. Lewis, respectfully request that this Honorable Court deny Petitioners' Petition for Writ of Certiorari in the matter of *Joseph and Theresa Alberici v. United States Government, et al.* (U.S. Court of Appeals No. 92-1258). Respondents also respectfully request that this Honorable Court award costs and sanctions, including but not limited to attorney's fees, against Petitioners and in favor of Respondents.

Respectfully submitted,
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BY: _____
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Date: April 12, 1993